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SUPREME COURT OF THE UNITED STATES

October Term, 1936.

No. 658

PAUL SENN, APPELLANT,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL No. 5, CHARLES SCHREIBER, ET AL.

Appeal from the Supreme Court of the State of Wisconsin

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

LEON B. LAMFROM,
Counsel for Appellant.

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SCOPE OF THIS BRIEF

After appellant's brief had been served upon counsel for the appellees, appellant's counsel was served with appellees' motion to dismiss and their brief in support thereof. It is the purpose of this brief to reply thereto. Inasmuch as appellees' brief in support of their motion to dismiss involves, for the most part, a consideration of the merits which we cover in our brief on the merits, this brief is merely supplemental to our brief on the merits.

We shall here consider the points raised by appellees, in their brief in support of the motion to dismiss, in the order in which they are raised.

MATERIAL FACTS

The contract (Plaintiff's Exhibit 1, R. 112), which appellees demanded that the appellant sign, was submitted to him for his signature in March, 1935. The material clause of this contract was:

> "ARTICLE III. It is definitely understood that no individual, member of a partnership or corporation engaged in the Tile Contracting Business shall work with the tools or act as Helper but that the installation of all materials claimed by the party of the second part as listed under the caption 'CLASSIFICATION OF WORK' in this agreement, shall be done by journeymen members of Tile Layers Protective Union Local No. 5." (R. 113)

Appellant was agreeable to entering into this contract provided only that said Article III was changed so that he would not be deprived of the right to work in his own business with his own hands (R. 40, 58-59, 78).

In appellees' brief, reference is made to contacts which existed between the appellant and the appellees prior to the time that the contract (Plaintiff's Exhibit 1, R. 112) was left with the appellant and the appellees demanded appellant's signature thereto. Apparently, this reference to such contact relations between the appellant and the appellees prior to March, 1935, is made for the purpose of showing that the picketing and related activities engaged in by the appellees, which appellant seeks to have restrained, were engaged in because of some dispute other or further than the dispute over the appellant's refusal to sign the contract unless it was amended to enable him to work in his own business with his hands.

The record in this case shows that the sole dispute which existed between the appellant and the appellees, at the time that the picketing and related activities commenced against him, was concerning appellant's refusal to sign the contract unless it be amended so as not to deprive him of the right to work in his own business. This appears from the following testimony of Charles Schreiber, the Business Agent of one of the appellees, Tile Layers Protective Union:

"Q. Now, what would you require of Mr. Senn to do today in order that you give up picketing his home and from picketing the jobs he works on?

"A. Sign this agreement." (R. 43)

This is also borne out by the statement of counsel for the appellees at the trial:

"Mr. Padway (counsel for appellees): He (Senn) is willing to do everything we ask of him but the one thing, 'I won't abstain, or promise to abstain from working with the tools of the trade at tile setting'." (R. 67)

The trial court found as a fact that the picketing and related activities were engaged in by the appellees because of the refusal of the appellant to sign the contract with the provision therein that he desist from working in his own business with his hands (Findings of Fact Nos. 9 and 10, R. 26-27).

In appellees' brief, inferentially at least, it is made to appear that the contract, which they demanded that the appellant sign, contained the clause prohibiting him from working in his own business with his own hands *because he was not qualified to do the work.* There was no finding made by the trial court and no determination by the appellate court that appellant was not qualified to do the work which he theretofore had done in his business and which he desired

to continue to do in his business. On the contrary, the evidence clearly establishes the fact that he was fully experienced and capable of doing the work (R. 50, 64-65, 81-82, 83, 99-100). Regardless, however, of whether appellant was qualified to do the work, it appears that the requirement in the contract that the appellant agree not to work in his own business with his hands was not personal to the appellant. On the contrary, it appears that this provision disqualifying an employer from working in his own business with his hands was a provision required of all employers in the business (R. 32, 67, 84) and the trial court so found (Finding of Fact No. 15, R. 28).

ARGUMENT

Point I

Under this point, appellees contend that the Wisconsin Labor Code does not involve the Fourteenth Amendment and that the Federal question involved is no longer a substantial one.

Speaking of the majority opinion of the Supreme Court of Wisconsin in the case at bar, the minority opinion stated:

> "The practice upheld by the court is Un-American, oppressive and intolerable. It is contrary to the concept that I have always had of the fundamental and inalienable rights of the individual citizen secured to him by the constitution of the United States. I cannot see that concept held for naught by this court without protest. And I will not yield that concept until it is declared erroneous by the final arbiter of that constitution. My concept of the inherent rights of man under the constitution may be merely an ideal that I may eventually have to give up, but I am still strong in my faith in it; and I will ever cherish it unless it shall be destroyed by the ultimate authority, the Supreme Court of the United States.
>
> "The defendants' claim that absence of due process in their depriving the plaintiff of his property and his liberty is avoided by the provision of the code

declaring peaceful picketing lawful and because, as they say, the plaintiff is free to work with his hands and tools upon his jobs if he wants to." (R. 127)

"As to the peaceful picketing declared lawful by the code, whether or not it may be declared lawful in furtherance of a strike of employees, it passes the bounds of reasonableness to say it may be used to coerce one into refraining from working with his hands and the tools of his trade or following his chosen calling or making contracts in the prosecution of his business." (R. 128)

"Whether it (picketing) is lawful or not depends upon the instant situation involved.

" 'The legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the XIVth Amendment is intended to preserve'."

"Truax Case, supra."
(R. 130)

The question squarely raised and considered in this case is—Is the Wisconsin Labor Code, construed by the Supreme Court of Wisconsin as legalizing picketing and related activities engaged in by appellees for the sole purpose of forcing appellant to give up his right to work in his own business with his hands, constitutional and valid under Section 1 of the Fourteenth Amendment to the United States Constitution.

It appears that appellees' position, as expressed in their brief, is that the Wisconsin Labor Code does not contravene the Fourteenth Amendment to the United States Constitution on the ground that the Wisconsin Labor Code was within the legitimate exercise of the police power in limiting equitable relief by way of injunction. Counsel states in this connection that "the limitation of this equitable relief is not meant to be nor is it declared to be an adjudication of the rights of appellant in an action at law for damages (Appellees' Brief on Jurisdiction, page 12).

It appears that counsel has overlooked the fact that under Section 103.56 of the Wisconsin Labor Code, it is only conduct *which is declared to be lawful* under Section 103.53 of the Wisconsin Labor Code which cannot be restrained. It is only by reason of the fact that the Supreme Court of Wisconsin held that the conduct of the appellees in the case at bar *was lawful* under the Wisconsin Labor Code that relief was denied the appellant. In the respect that the Wisconsin Labor Code provides that conduct therein described, engaged in in the course of labor disputes, is lawful, it differs from the Norris-La Guardia Act, 29 U.S.C.A. Sections 101 to 115, referred to in appellees' brief. The Norris-La Guardia Act merely limits the jurisdiction of inferior Federal courts to issue injunctions in cases involving labor disputes. It contains no provisions similar to those contained in Section 103.53 of the Wisconsin Labor Code, defining "lawful conduct in labor disputes." The provisions declaring what conduct is lawful in "labor disputes" are peculiar to the Wisconsin Labor Code. (Sec. 104, the pertinent section, of the Norris-La Guardia Act will be found in the Appendix hereto at p. 23-24.

The Wisconsin Labor Code, in so far as it, as construed by the Supreme Court of Wisconsin in the case at bar, makes the conduct of the appellees lawful, effectually denies appellant not only equitable relief but denies him any relief whatsoever by damages at law. It is axiomatic, of course, that no damages can be recovered as against conduct which is lawful.

The cases cited by counsel involving the Norris-La Guardia Act are not in point for two reasons: *First,* the Norris-La Guardia Act involves the consideration of the power of Congress to limit the equity jurisdiction of inferior Federal courts, and, *second,* they do not involve the question as to the validity of picketing and related activities *engaged in*

for the purpose of forcing an employer to give up his right to work in his own business with his hands.

Similarly, the other cases cited by counsel are not pertinent or applicable to the consideration of the validity of the Wisconsin Labor Code as applied to the conduct of the appellees in the case at bar. None of the cases cited involved picketing or related activities *to force an employer to give up his right to work in his own business.*

Counsel cites cases bearing on the point that a state legislature may prescribe procedural regulations in given situations. Manifestly, those cases are not in point inasmuch as we are here concerned, not with the question of procedure, but the *denial of a remedy.*

What we have heretofore stated concerning the Norris-La Guardia Act applies equally to Section 20 of the Clayton Act (38 U. S. Stats. at Large, 730, Ch. 323), referred to by counsel, and the cases cited by counsel involving said Act.

In *Truax v. Corrigan,* 257 U. S. 312, 340, 66 L. Ed. 254, this court disposed of the argument that if it held the Arizona law invalid under the Fourteenth Amendment it would in effect hold invalid Section 20 of the Clayton Act, as follows:

> "It is urged that, in holding Chap. 1464 invalid, we are in effect holding invalid Sec. 20 of the Clayton Act (38 Stat. at L. 738, chap. 323, Comp. Stat. sec. 1243d, 6 Fed. Stat. Anno. 2d ed. p. 141). Of course, we are not doing so. In the first place, the equality clause of the 14th Amendment does not apply to congressional but only to state action. In the second place, Sec. 20 of the Clayton Act never has been construed or applied as the supreme court of Arizona has construed and applied Chap. 1464 in this case."

Counsel devotes a considerable portion of his brief to the point that the Supreme Court of Wisconsin properly construed the Wisconsin Labor Code as legalizing the ac-

tivities of the appellees in the case at bar. No attempt has been made or is now being made to attack the construction. It has been our position and is now our position that the Wisconsin Labor Code, as construed by the Supreme Court of Wisconsin, is invalid if it denies appellant relief against the activities of the appellees when the picketing and related activities are *in furtherance of a conspiracy to force the appellant to give up his right to work in his own business.* But for the fact that the Wisconsin Supreme Court construed the Wisconsin Labor Code as making appellees' conduct lawful, we would not be here contending that the appellant was deprived of property without due process and denied the equal protection of the laws under the Fourteenth Amendment to the United States Constitution. It is the Wisconsin Labor Code, as construed by the Supreme Court of Wisconsin and *as applied to the facts in the case at bar,* which we assert deprives appellant of property without due process and denies him the equal protection of the laws.

Counsel contends that *Truax v. Corrigan,* 257 U. S. 312, 66 L. Ed. 254, and *Coppage v. Kansas,* 236 U. S. 1, 59 L. Ed. 441, relied upon by the appellant and referred to in appellant's brief on the merits, are not in point on the ground that in those cases the acts under consideration were tortious and that the activities of the appellees in the case at bar were not tortious. In reply to this we say, as did the minority opinion in the case at bar:

> "The defendants claim that absence of due process in their depriving the plaintiff of his property and his liberty is avoided by the provision of the code declaring peaceful picketing lawful and because, as they say, the plaintiff is free to work with his hands and tools upon his jobs if he wants to. As to the latter, the plaintiff is no more free so to work in the face of the threat of destruction of his business and deprivation of his means of livelihood by continued and in-

cessant picketing than he would be in the face of a threat to 'beat him up' every time he took a contract for tiling. In the latter case he could make his contract and take his beating, if he wanted to, but it is quite apparent that he would not want to, and would refrain from subjecting himself to the threatened beating. A labor union may not use its power to such ends and with such effect." (R. 127)

"The only provision of the proposed contract to which he (appellant) will not accede is the one denying him the right to labor with his own hands and tools upon the jobs he contracts to perform. He has not sufficient capital to enable him to take any but small jobs. Such jobs as he can handle will yield no profit unless he works upon them himself. He cannot make a living at laying tile as a journeyman without membership in the defendant union, and that is denied him because he has not served three years as apprentice to a journeyman tile layer, and without such membership he cannot procure sufficient employment as a journeyman. To picket his jobs will injure his business as a contractor and reduce his earnings below sufficiency for support of himself and family. Destruction of plaintiff's business through picketing is the object of the defendants and is likely to be attained if the picketing be continued. * * * The requirement that no contractor shall work with his own hands and his own tools upon a job would foreclose every worker, union as well as non-union, from entering the contracting business unless he has or is able to procure capital otherwise not necessary for entry into and prosecution of the business to success. I cannot believe that such result is made lawful by the claim that it is nothing but economic pressure applied to the furtherance of the cause of workers as a whole or of that class of workers belonging to labor unions." (R. 126-127)

The avowed object and purpose of the appellees in engaging in the picketing and related activities against the appellant was to force him, against his will, to agree not to work in his own business with his hands and tools (R. 43, 67).

We submit that when counsel states (Appellees' Brief on Jurisdiction p. 24) that the only tortious acts involved in the case at bar consisted of the proposed secondary boycott which the appellees, through their counsel, agreed to withdraw, he is begging the question. It is our position, as we point out in our brief on the merits, that the right of an individual to work in his own business is an inalienable right which is protected by Section 1 of the Fourteenth Amendment to the United States Constitution, and that any statute permitting a concert of activity designed to harrass, injure and interfere with an individual for the purpose of forcing him *to give up his right to work in his own business* is in contravention of the guarantees afforded by the Fourteenth Amendment to the United States Constitution. If such right of an individual is, as we assert, protected by the Fourteenth Amendment to the United States Constitution, any such interference with that right must of necessity be tortious. If a statute permitting picketing and related activities by labor unions representing none of an employer's employees, carried on for the purpose of compelling an employer to give up his right to work in his own business, contravenes the Fourteenth Amendment to the United States Constitution *because such acts cannot be made lawful,* such acts must of necessity be tortious *per se.*

Concert of action is a conspiracy and tortious if its object is unlawful, though the acts committed in connection therewith are otherwise lawful.

Pettibone v. United States, 148 U. S. 197, 203, 37 L. Ed. 419;

Duplex Printing Press Co. v. Deering, 254 U. S. 443, 467, 65 L. Ed. 349;

Truax v. Corrigan, 257 U. S. 312, 327, 66 L. Ed. 254.

In the case at bar, the appellant was harrassed, followed on the streets, picketed and bannered with signs holding out to the public that he was *unfair* to the Tile Layers Protective Union and should not be patronized (R. 41), despite the fact that he was willing to accede to all of its demands excepting only the demand that he agree not to work in his own business with his hands and tools (R. 59, 67).

We do not challenge the right of labor to organize and employ its recognized powers to further its legitimate interests. We do assert, however, that the concert of activities of the appellees and the picketing and related activities of the appellees directed against Senn are unlawful, *because their object is to force Senn to agree to give up a right protected by the Federal Constitution—the right to work with his hands in his own business.*

The following excerpt from *Gompers v. Buck's Stove & R. Co.*, 221 U. S. 418, 439, 55 L. Ed. 797, is in point here:

> "Society itself is an organization, and does not object to organizations for social, religious, business, and all legal purposes. The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association. By virtue of this right, powerful labor unions have been organized.
>
> "But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. *This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights, and appealing to the preventive powers of a court of equity. When such appeal is made, it is the duty of government*

to protect the one against the many, as well as the many against the one. (italics ours)

> "In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published gives the words 'Unfair,' 'We Don't Patronize,' or similar expressions, a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called 'verbal acts,' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged."

That so-called "peaceful persuasion" may nevertheless be unlawful if the object thereof is to force an individual, as stated in the *Gompers* case, to sacrifice rights protected by the Constitution, is also pointed out in *Duplex Printing Press Co. v. Deering,* 254 U. S. 443, 467, 65 L. Ed. 349, where this court said:

> "It is settled by these decisions that such a restraint produced by peaceable persuasion is as much within the prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute."

In the foregoing statement, this court referred to the fact that activities of the defendants in the *Duplex* case impaired the right of the plaintiff to engage in interstate commerce contrary to the provisions of the Sherman Act and consequently were illegal. The impairment involved in the case at bar, we submit, is of a far more serious nature. The object of the conspiracy here involved is to force Senn to relinquish his right to do any work at all in his own business with his hands and tools. The distinction between the case at bar and the *Duplex* case is that the right invaded

here is a *constitutional* right, while the right invaded in the *Duplex* case was a right created by statute.

Answering further counsel's contention that the acts of the appellees were not tortious *per se*:

But for the fact that the trial court found that a labor dispute existed between the appellant and the appellees within the meaning of the Wisconsin Labor Code (Conclusion of Law No. 1, R. 29), appellees would have been guilty of a criminal conspiracy within the meaning of Section 343.681 of the Wisconsin Statutes of 1935, which was held constitutional by this court in *Aikens v. Wisconsin*, 195 U. S. 194, 49 L. Ed. 154. Said section provides:

> "*Injury to business; restraint of will.* Any two or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars."

This conclusion of the trial court was affirmed by the Supreme Court of the State of Wisconsin in the case at bar. See also companion case, *American Furniture Company v. I. B. of T. C. and H. of A*, etc., 268 N. W. 250, the decision in which was handed down at the same time as the decision in the case at bar.

Counsel has cited a number of cases bearing on the academic question of the right of Congress to limit the jurisdiction of inferior Federal courts and the power of the state courts to regulate the procedure in state courts. Not one of the cases cited either directly or indirectly uphold the

validity of an act which makes it lawful to picket an employer and brand him as "unfair" when the sole object of the picketing is to compel the employer to give up his right to work in his own business.

As we point out in our brief on the merits, on the other hand, there is ample authority that any statute which makes it lawful to picket and banner an employer as unfair to a union merely because he refuses to give up his inalienable right to work in his own business violates the "due process" and "equal protection" clause of the Fourteenth Amendment to the United States Constitution.

In addition to what we have here said concerning the object of the activities engaged in by the appellees, we have the further fact that none of the appellees were employees of appellant, represented any of his employees, or were under privity of relationship with the appellant. Inasmuch as this point has been considered at some length in our brief on the merits, we shall not refer to it further in this brief, excepting that we would like to add to what we have there said that but for the Wisconsin Labor Code, as construed by the Supreme Court of the State of Wisconsin in the case at bar and the companion case of *American Furniture Company v. I. B. of T. C. and H. of A.*, etc., 268 N. W. 250, picketing and related activities engaged in by labor unions who represented none of an employer's employees would have been restrained.

Duplex Printing Press Co. v. Deering, 254 U. S. 443, 65 L. Ed. 349, 41 S. Ct. R. 172, 16 A. L. R. 172, 207;

American Steel Foundries Co. v. Tri-City C. T. Council, 257 U. S. 184, 66 L. Ed. 189, 42 S. Ct. R. 72, 27 A. L. R. 360, 369;

Ferguson v. Peake, 18 F. (2d) 166, 167 (Ct. of App. D. C.);

Waitresses Union v. Benish Restaurant Co., 6 F. (2d) 568 (C. C. A. 8th Cir.);

Montgomery v. Pacific Electric Co., 293 Fed. 680;

Quinlivan v. Dail-Overland Co., 274 Fed. 56, 65 (C. C. A. 6th Cir.);

Dail-Overland Co. v. Willys-Overland, Inc., 263 Fed. 171;

Gevas v. Greek Restaurant Workers Club, 134 A. (N. J.) 309;

Blakely Laundry Co. v. Cleaners etc. Union, 169 A. (N. J.) 541;

Harvey v. Chapman, 115 N. E. (Mass.) 304, 305;

M. Steinert & Sons Co. v. Tagen, 93 N. E. (Mass.) 584, 585.

In the case of *American Steel Foundries v. Tri-City C. T. Council*, 257 U. S. 184, 202, 66 L. Ed. 189, 42 S. Ct. R. 72, 27 A. L. R. 360, 369, this court enunciated the principle as follows:

> "It has been determined by this court that • • • the second paragraph (of sec. 20 of the Clayton Act) applies only in cases growing out of a dispute concerning terms or conditions of employment between an employer and employee, between employers and employees, or between employees, or between persons employed and persons seeking employment, *and not to such a dispute between an employer and persons who are neither ex-employees nor seeking employment.* Duplex Printing Press Co. vs. Deering, 254 U. S. 443, 65 L. Ed. 349, 16 A. L. R. 196, 41 Sup. Ct. Rep. 172. *Only two of the defendants, Cook and Churchill, who left at the time of the strike, can invoke in their behalf sec. 20.*" (italics ours)

It is our position that the Wisconsin Labor Code, as construed by the Supreme Court of the State of Wisconsin, violates the Fourteenth Amendment in the respects heretofore stated for two reasons, taken either in combination or independently of each other: *First,* to the extent that it denies a remedy against picketing and related activities, the object of which is to force an employer not to work in his own business, regardless of the status of the parties picketing the employer; and, *second,* to the extent that it permits picketing and related activities by labor unions or others representing none of the employer's employees.

Point II

Under this point, appellees contend that the findings of the trial and appellate courts as to the purposes and reasonableness of the demand are findings of fact; that such findings are not reviewable by this court; and that under such findings of fact, no Federal right has been denied to the appellant.

Counsel has apparently overlooked the fact that in cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongfully denied, and in which the state court has put its decision on a finding that the Federal right asserted has no basis, this court, as an incident of its power to determine whether a Federal right has been wrongfully denied, may go behind the finding to see whether it is without substantial support.

> *Kansas City Southern R. Co. v. H. Albers Commission Co.,* 223 U. S. 573, 591, 593, 56 L. Ed. 556, 565, 566;
>
> *Cedar Rapids Gaslight Co. v. Cedar Rapids,* 223 U. S. 655, 668, 669, 56 L. Ed. 594, 604;

Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. Ed. 662, 669;

Truax v. Corrigan, 257 U. S. 312, 324, 66 L. Ed. 254, 259.

It is significant to note that no finding of fact or conclusion of law was made by the trial court nor was any statement made by the appellate court in the case at bar to the effect that the Wisconsin Labor Code, as construed by the court, was in the furtherance of the best interests of the general public and that the public welfare was promoted thereby. On the contrary, the sole and only finding and conclusion of law by the trial court and the only statement made by the appellate court was that the demand made by the appellees that the appellant agree not to work in his own business was reasonably for the protection of the appellees as workers and craftsmen in the industry (Conclusion of Law No. 5, R. 29, and majority opinion R. 121). Significant in this connection is the following statement in the minority opinion in the case at bar:

> "And as I understand the welfare requirement, the welfare served must be that of the public, not that of a particular class of the public to the detriment of another class of the public. To rule that peaceful picketing in every case is lawful, would serve the interest of organized labor to the detriment of unorganized labor and not induce to the welfare of the public as a whole • • • To justify statutes affecting one class of the society to the detriment of another class, if there can be any such justification, the advantage to the one class must at least so overbalance the disadvantages to the other that the welfare of the public as a whole is thereby advanced. The instant statute, if applied to the situation here involved, in my opinion does not meet these tests." (R. 130)

Counsel states (Appellees' Brief on Jurisdiction p. 33) that, "If the purposes are directed towards improvement of

working conditions, then the peaceful activities are lawful, and the resultant hardships, if any, to the employer become damnum absque injuria." If this is true, the countless cases bearing upon the limitation on the exercise of the police power by state legislatures, which lay down the well-known rule that the police power must be exercised for the public benefit and welfare and not for the purpose of benefitting one class at the expense of another, are completely overthrown and have merely historical value. If this is true, the "due process" and "equal protection" clauses of the Fourteenth Amendment become more innocuous verbiage. Fortunately, however, the supreme law of the land is still the Constitution of the United States and the guarantees against deprivation of property without due process and denial of the equal protection of the laws still protect individuals in their right to work with his hands in his own business.

The sole question in this case is whether or not the Wisconsin Labor Code, under the admitted facts, can, in face of the Fourteenth Amendment, legalize picketing and related activities, the object and purpose of which is to force an employer to give up his right to work in his own business, particularly when those activities are engaged in by labor unions representing none of the employer's employees. We submit that the question as to whether or not the Wisconsin Labor Code can legalize such activities, involving, as it does, rights protected to him by the Fourteenth Amendment to the United States Constitution, is a matter for this court to determine for itself. This court never has, and, we respectfully submit, as long as the Fourteenth Amendment remains in the United States Constitution never will, countenance interference by any organized group with the right of an individual to work in his own business *merely*

because the best interests of the group would be advanced if they succeeded in stopping him from working in his own business.

What we have said here is to be supplemented by what we have said in our brief on the merits.

Point III

Under this point, counsel asserts that the demand upon the appellant that he agree not to work in his own business with his hands and tools was justified because of the union rules and regulations, and that the union rules and regulations are not within the jurisdiction of this court for the purpose of review.

In answer to what is covered under this point in Appellees' Brief on Jurisdiction, permit us to state that we have not challenged and are not here challenging any of the rules or regulations of the appellee unions. We agree with counsel that the rules and regulations of the appellee unions are not before this court for review. The sole question before this court is whether or not the Wisconsin Labor Code, in so far as it denies a remedy against picketing and related activities by labor unions, the object and purpose of which is to force an employer to agree not to work in his own business with his hands and tools, violates the Fourteenth Amendment to the United States Constitution.

Whether the demand made upon the appellant that he agree not to work in his own busines was made in pursuance of union rules is quite beside the point. The fact is that a demand was made upon the appellant to agree not to work in his own business, and the further fact is that the picketing and related activities engaged in by the appellees were not restrained solely and only because of the determination of the trial and appellate courts that such activ-

ities were made lawful for said object and purpose by the Wisconsin Labor Code.

CONCLUSION

We state, as did the minority opinion in the case at bar (R. 125):

> "As quoted in Cameron v. International Alliance T. S. E., 118 N. J. Eq. 11, 176 Atl. 692:
>
> "'There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more or less than the sacred right of labor.'
>
> "'The right of a workman to the "free use of his hands" has been described as one "of which the legislature cannot deprive him, one which the law of no trades union can take from him, and one which it is the bounden duty of the courts to protect." "A man may not barter away his life or his freedom or his substantial rights." Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. Ed. 365.'
>
> "These statements imply that the right to labor with one's own hands when one will and as he will, the right to follow a chosen occupation or business, the right to earn one's own living, and the right to contract are so sacred, so valuable, so important to the individual, that no one may be coerced into giving them up, and when as here the means of coercing their surrender results in irreparable injury to the individual, the coercion should upon established principles of equity be enjoined. We are not here concerned with licensing restrictions or the like imposed under the police power for the protection of the public. We need only consider the facts of the instant case to perceive the denial and deprivation of liberty of the plaintiff and I perceive no 'due process' by which the result is produced."

The following cases, cited in our brief on the merits, amply sustain our position that, inasmuch as the Wisconsin Labor Code denies appellant a remedy in the case at bar, it violates the "due process" and "equal protection of the law" clauses of the Fourteenth Amendment to the United

States Constitution:

Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254;

Coppage v. Kansas, 236 U. S. 1, 59 L. Ed. 441;

Butchers' Union Slaughter-House and Live Stock Landing Company vs. Crescent City Live Stock Landing and Slaughter-House Company, 111 U. S. 746, 28 L. Ed. 585;

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. Ed. 260;

Adair v. United States, 208 U. S. 161, 52 L. Ed. 436;
Allgeyer v. Louisiana, 165 U. S. 578, 41 L. Ed. 832, 17 S. Ct. 427;

Truax v. Raich, 239 U. S. 33, 60 L. Ed. 131;
In re Opinion of the Justices, 86 N. H. 597, 166 Atl. 640;

In re Opinion of the Justices, 211 Mass. 618, 98 N. E. 337.

We respectfully request that the motion for dismissal be denied.

Respectfully submitted,

LEON B. LAMFROM,

Counsel for Appellant.

APPENDIX

Section 104, Norris-La Guardia Act, 29 U.S.C.A. Sections 101 to 115.

Sec. 104. *Enumeration of specific acts not subject to restraining orders or injunctions.* No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this chapter;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this chapter. (Mar. 23, 1932, c. 90, S. 4, 47 Stat. 70.)